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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**

16 Barry Goldwater Institute for Public Policy
17 Research,

18 Plaintiff,

19 v.

20 United States Department of Education,

21 Defendant.

No. 2:24-cv-00314-SMM

22 **DEFENDANT’S REPLY IN SUPPORT**
23 **OF CROSS-MOTION FOR**
24 **SUMMARY JUDGMENT**

25 Defendant United States Department of Education, by and through undersigned
26 counsel, hereby files this Reply in Support of its Cross-Motion for Summary Judgment.
27 Doc. 22.

28 **I. SUMMARY OF ARGUMENT**

Plaintiff, the Barry Goldwater Institute for Public Policy Research, seeks review of Defendant’s response to Plaintiff’s request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Doc. 14. Plaintiff’s December 2023 FOIA request sought records concerning the Department’s investigation into Grand Canyon University (“GCU”) for violations of the Higher Education Act and/or federal regulations, as well as GCU’s Provisional Program Participation Agreement. Doc. 1-1 at 1. Defendant dutifully searched

for and produced all responsive documents subject to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), which protects disclosure of intra- and inter-agency records protected by, among other civil discovery privileges, the deliberative process privilege, attorney-client privilege, and attorney work-product privilege, and FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which protects disclosure of records “compiled for law enforcement purposes . . . [that] could reasonably be expected to interfere with enforcement proceedings.” As demonstrated by the declarations of Christopher Madaio and Joanna L. Torres, and the *Vaughn* index describing the information withheld, there is no genuine issue of material fact regarding the propriety of Defendant’s withholdings under FOIA Exemptions 5 and 7(A), and Defendant is entitled to judgment as a matter of law. Doc. 23-1; Doc. 23-2; Doc. 23-3.

II. ARGUMENT

A. Plaintiff is Not Entitled to Declaratory Relief for Defendant’s Failure to Respond to Plaintiff’s FOIA Request Within the Statutory Time Period.

Plaintiff alleges that Defendant failed to respond to Plaintiff’s FOIA request within the statutory period. Doc. 18 at 6. Although it was unclear from Plaintiff’s Motion for Summary Judgment what relief Plaintiff requests for Defendant’s failure to respond within the statutory period (Doc. 18 at 6-8), Plaintiff now requests in its Reply that the Court order “a declaration regarding the Department’s FOIA violation on that issue” (Doc. 26 at 3). Defendant again denies that Plaintiff is entitled to any relief for Defendant’s failure to respond within the statutory period.

The Ninth Circuit has recognized two separate claims that a FOIA requester can bring against an agency under FOIA. *Hajro v. U.S. Citizenship & Immigr. Servs.*, 811 F.3d 1086, 1102-03 (9th Cir. 2016). The first is known as a “specific FOIA request claim,” wherein “a plaintiff attacks a specific agency action for (1) ‘improperly’ (2) ‘withheld’ (3) ‘agency records.’” *Id.* at 1103 (quoting *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980)). A FOIA requester may also assert that an agency has engaged in a “pattern or practice” of violating the FOIA time limits. *Id.* at 1103.

1 In a “pattern or practice” claim, the FOIA requester alleges that “an agency policy or
2 practice will impair the party’s lawful access to information in the future.” *Id.* at 1103
3 (quoting *Payne Enters., Inc. v. U.S.*, 837 F.2d 486, 491 (D.C. Cir. 1988)).

4 Here, neither Plaintiff’s Amended Complaint nor Plaintiff’s Motion for Summary
5 Judgment allege a pattern or practice violation. Doc. 14; Doc 18. Despite this, Plaintiff
6 alleges in its Reply—for the first time—that Defendant “has engaged in a pattern or
7 practice of violating FOIA’s time limits.” Doc. 26 at 3. Accordingly, Plaintiff’s pattern or
8 practice claim is not properly before the Court, and fails. *See Earth Island Inst. v. U.S.*
9 *Forest Serv.*, 87 F. 4th 1054, 1073 (9th Cir. 2023) (“Since [plaintiff] did not plead this
10 claim in its complaint, it was not properly before the district court, and fails.”); *Quick v.*
11 *U.S. Dep’t of Commerce, Nat’l Inst. of Standards and Tech.*, 775 F. Supp. 2d 174, 183
12 (D.D.C. 2011) (explaining that plaintiff’s “pattern or practice” claim “fails at the outset for
13 the simple reason that nothing even remotely resembling a ‘pattern or practice’ claim
14 appears within the four corners of [plaintiff’s] Complaint”).

15 Plaintiff alleges only a specific FOIA request claim—that Defendant improperly
16 withheld agency records. Doc. 14 at 1. Plaintiff contends that Defendant’s production of
17 the documents does not moot Plaintiff’s request for declaratory relief. Doc. 26 at 3.
18 However, the cases Plaintiff cites in support of this assertion are inapposite. Doc. 26 at
19 3-5.

20 The case *Muckrock, LLC v. CIA*, 300 F. Supp. 3d 108, 135-36 (D.D.C. 2018) is
21 distinguishable because the plaintiff in *Muckrock* alleged a policy or practice claim and the
22 court granted declaratory relief noting that the “CIA’s email policy violates the FOIA.”
23 Likewise, *Owen v. U.S. Immigr. & Customs Enf’t*, No. CV 22-0550-DSF (AFMX), 2023
24 WL 9470904, at *8 (C.D. Cal. Jan. 12, 2023), which Plaintiff cites for the proposition that
25 “declaratory judgment is an appropriate way to address FOIA delays” (Doc. 26 at 5), is
26 also distinguishable because there, the court specified that “[c]ourts grant declaratory
27 judgment in the FOIA context only where there is a *practice or policy* of delayed disclosure
28 that seems likely to repeat itself – rather than an isolated incident.” 2023 WL 9470904, at

*8 (emphasis added). The court in *Owen* therefore denied plaintiff's request for declaratory relief against the agency because the agency's "behavior has not formed a pattern sufficient to warrant declaratory relief." *Id.*

Lastly, Plaintiff cites *Transgender Law Center v. Immigr. & Customs Enf't*, 46 F.4th 771, 778 (9th Cir. 2022), for the proposition that declaratory relief is appropriate where the agency fails to timely respond to a FOIA request (Doc. 26 at 3). However, in that case the plaintiff appealed the district court's grant of summary judgment to the agencies on the issues of compliance with plaintiff's FOIA request, adequacy of the search and *Vaughn* indices, and application of exemptions to the documents at issue. *Id.* The issue of the district court's grant of declaratory relief in favor of plaintiff was not before the Court of Appeals, which, consequently, offered no guidance on whether such relief was appropriate. *Id.*

Accordingly, because Defendant produced all non-exempt documents (Doc. 22 at 2-6), Plaintiff's FOIA action is moot. *See Hajro*, 811 F.3d at 1092, 1103; *Papa v. United States*, 281 F.3d 1004, 1013 & n.42 (9th Cir. 2002) ("[T]he production of all nonexempt material, 'however belatedly,' moots FOIA claims." (quoting *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982))). Moreover, because Plaintiff has not alleged a pattern or practice claim, declaratory relief is inappropriate. *See Owen*, 2023 WL 9470904, at *8; *Shapiro v. U.S. Dep't of Just.*, 507 F. Supp. 3d 283, 336 (D.D.C. 2020) ("Courts in this circuit grant declaratory relief when they find that an agency has a policy or practice that violates FOIA, so long as there is at least some chance that the agency might continue to apply the policy in the future."); *Navigators Ins. Co. v. U.S. Dep't of Just.*, 155 F. Supp. 3d 157, 168 (D. Conn. 2016) ("[I]n the FOIA context, courts have granted declaratory judgments where a plaintiff has shown that an agency engaged in a pattern or practice of delayed disclosure and that it is possible the violations will recur with respect to the same requesters."). The Court should deny Plaintiff's request for declaratory relief.

B. Defendant Properly Withheld Records Under the FOIA Exemptions.

1. Defendant Properly Withheld Records Under Exemption 5.

1 Defendant withheld, pursuant to 5 U.S.C. § 552(b)(5), portions of documents that
 2 contain investigative and other internal communications, internal memoranda,
 3 communications with attorneys representing Defendant, and attorney work-product. Doc.
 4 23 at ¶¶ 16-24.

5 FOIA Exemption 5 protects from disclosure “inter-agency or intra-agency
 6 memorandums or letters which would not be available by law to a party other than an
 7 agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). Exemption 5 “entitles an
 8 agency to withhold from the public ‘documents which a private party could not discover
 9 in litigation with the agency.’” *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d
 10 1089, 1092 (9th Cir. 1997) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148
 11 (1975)). It therefore covers the deliberative process privilege, attorney-client privilege,
 12 and attorney work-product privilege. *Id.*

13 First, Plaintiff argues that Exemption 5 does not apply to information related to the
 14 decision to initiate a monetary fine against GCU because it was not a “policy decision.”
 15 Doc. 26 at 6-7. However, as Plaintiff correctly notes in its Reply (Doc. 26 at 6), the
 16 deliberative process privilege covers “documents reflecting advisory opinions,
 17 recommendations, and deliberations that are part of a process by which government
 18 *decisions* and policies are formulated.” *Reps. Comm. for Freedom of the Press v. FBI*, 3
 19 F.4th 350, 361 (D.C. Cir. 2021) (emphasis added) (citation omitted). Exemption 5
 20 therefore applies to records related to the Department’s decision to initiate a fine action
 21 against GCU.

22 Second, Plaintiff argues Exemption 5 does not apply to documents that contain
 23 “facts relayed by agency counsel.” Doc. 26 at 7. However, factual material is protected
 24 under the deliberative process privilege “[w]here either the disclosure of the manner of
 25 selecting or presenting facts would expose the deliberative process, or where facts are
 26 ‘inextricably intertwined’ with ‘policy-making processes.’” *Nat’l Wildlife Fed. v. U.S.*
 27 *Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988) (quoting *Ryan v. Dep’t of Justice*, 617
 28 F.2d 781, 790 (D.C. Cir. 1980)). “Factual materials . . . would likewise be exempt from

1 disclosure to the extent that they reveal the mental processes of decisionmakers.” *Id.*

2 As explained in the Department’s *Vaughn* index (Doc. 23-3), many of the
3 documents at issue contain: (1) mental impressions and summary of relevant facts related
4 to the GCU investigation, the disclosure of which would expose the deliberative process in
5 issuing a finding and determining what, if any, actions to take in the GCU investigation
6 (FOIA Docs. Nos. 4, 7); (2) recommendations on Department action which include
7 selective facts to support such recommendations, the disclosure of which would expose the
8 deliberative process in investigating and taking enforcement action (FOIA Docs. Nos. 6,
9 39, 112); (3) legal conclusions by Department attorneys which include selective facts to
10 support such legal conclusions and recommendations, the disclosure of which would
11 expose the deliberative process by providing insights into the attorneys’ decision-making
12 processes (FOIA Docs. Nos. 50, 54, 113); and (4) agency officials’ summary and
13 impressions of, among other things, certain events in the investigation, the disclosure of
14 which would expose the deliberative process by revealing such officials’ predecisional
15 views on the investigation (FOIA Docs. Nos. 96, 98).

16 Third, Plaintiff argues the Department applied Exemption 5 to “communications
17 with outside parties,” and that such communications are not covered by the deliberative
18 process privilege, attorney-client privilege, or attorney work-product privilege. Doc. 26 at
19 7-8. As shown in the *Vaughn* index, the Department withheld portions of internal emails
20 between Department employees, which were not exchanged with non-Executive branch
21 individuals/entities. Doc. 23-3, FOIA Docs. Nos. 29, 32, 69, 70, 72, 73, 75, 82-86, 88, 91,
22 121-122, 124, 126, 130. The emails at issue are email threads—that is, they are a series of
23 emails grouped together in a single conversation, with the most recent email appearing at
24 the top of the thread. Although these email threads may contain copies (i.e., forwards) of
25 emails exchanged with non-executive branch personnel, the emails at issue are wholly
26 internal, that is, solely between Department employees or other executive branch
27 individuals/entities. Additionally, the Department withheld under Exemption 5 Madaio’s
28 summary and mental impressions of certain phone calls or communications with GCU’s

1 counsel, the disclosure of which would discourage Department employees from sharing
2 their impressions of communications with external parties in the decision-making process.
3 Doc. 23-3, FOIA Docs. Nos. 108, 120. Lastly, Plaintiff misidentifies the following
4 documents as having been withheld under Exemption 5: 103, 131-138.

5 Fourth, Plaintiff argues that records related to the Department's press activities
6 should be released, arguing they are not policy decisions covered by Exemption 5. Doc.
7 26 at 8. In *Transgender Law Center*, the Ninth Circuit remanded to direct the release of
8 certain draft press statements where "the agencies withheld draft statements without
9 adequately explaining how they reveal a deliberative process." 46 F.4th at 783. By
10 contrast, here, as explained in the *Vaughn* index, some of the documents Plaintiff identifies
11 were emails to the then-Chief Operating Officer of FSA containing items for his approval
12 and read-ahead materials, which contained, among other things, "recommendations
13 concerning a variety of policy issues" and "informational updates on ongoing policy work."
14 Doc. 23-3, FOIA Docs. Nos. 1-3. Further, other documents, or portions thereof, were
15 withheld because they contain "strategic information concerning the status of" or "strategic
16 discussions" on the GCU investigation. Doc. 23-3, FOIA Docs. Nos. 61, 101, 128. Such
17 materials are distinguishable from those documents in *Transgender Law Center* because
18 they are not simply "deliberations regarding how best to address public relations matters
19 or possible responses to an inquiry received from an outside entity." 46 F. 4th at 783
20 (citation omitted). Instead, they are part and parcel of the Department's internal
21 deliberations on decisions to be made in GCU investigation and fine action—such
22 communications were therefore not merely responsive to outside inquires or deliberations
23 on how to best address the public. *See id.*

24 Regardless of whether the deliberative process privilege applies to the majority of
25 emails in FOIA Doc. No. 94, such emails were withheld under the attorney-client privilege
26 (Doc. 23-3, FOIA Doc. No. 94); as such, the withheld materials need not be related to a
27 "policy decision." Although the Department does not concede that the emails in FOIA
28 Doc. 94 are not protected by the deliberative process privilege, the Department is no longer

1 withholding under the deliberative process privilege most of the emails relating to the draft
 2 press statements withheld under Exemption 5 in FOIA Doc. No. 94. Instead, such emails
 3 are only being withheld under the attorney-client privilege. However, the Department is
 4 still withholding the October 9, 2023, emails of Benjamin Miller and Christopher Madaio
 5 in FOIA Doc. No. 94 under the deliberative process privilege.¹ See Exhibit 1, Revised
 6 *Vaughn* index (revisions in redline), FOIA Doc. No. 94.

7 Fifth, Plaintiff argues the subject lines of emails should be produced because they
 8 are “not draft documents.” Doc. 26 at 8. The Department did not withhold the subject
 9 lines of emails because they are “draft documents.” Rather, as explained in the
 10 Department’s *Vaughn* index, the Department withheld the subject lines of certain emails
 11 because they would reveal deliberative material, attorney-client communications, and/or
 12 attorney-work product, including: (1) specific recommendations and/or strategy under
 13 discussion; (2) specific aspects of the GCU investigation being discussed by agency
 14 attorneys; (3) the nature of the issues for which FSA sought legal advice; and (4) the nature
 15 of the strategic discussions. Doc. 23-3, FOIA Docs. Nos. 5, 11-12, 15, 19, 20-24, 26-27,
 16 31, 33, 35, 37, 42, 45-46, 48, 58, 60, 68, 76-79, 99, 119, 125, 128.

17 Sixth, Plaintiff argues the Department applied Exemption 5 to post-decisional
 18 documents. Doc. 26 at 8. Although the then-Chief Operating Officer of FSA, Richard
 19 Corday, approved the initiation of a fine action against GCU on October 22, 2023, “[t]he
 20 October 31, 2023, letter that initiated the fine action against GCU represents the
 21 Department’s final decision to initiate the fine action and the amount of the initiated fine,
 22 as well as the Department’s formal, final reasoning for initiating the fine action.” Doc.
 23 23-2 at ¶ 13. Therefore, as explained in the Department’s *Vaughn* index, the emails at issue
 24 are not post-decisional because they predate the Department’s October 31, 2023, letter
 25 which represents the final agency decision. Doc. 23-3, FOIA Docs. Nos. 118-120, 123-
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 28 ¹ The October 9, 2023, emails of Miller and Madaio in FOIA Doc. No. 94 are on the page
 Bates stamped “REVISED ED 24-00550-F (Apr. 15, 2024)_000420”.

1 130. Additionally, Plaintiff has misidentified many of the emails as concerning the fine
 2 action when instead they concern condition B of GCU's PPPA, specifically, deliberations
 3 about a letter received from GCU's counsel, and how to respond to it (FOIA Docs. Nos.
 4 121-122, 124, 126). Finally, many portions of the documents at issue were also withheld
 5 under the attorney-client privilege and/or attorney-work product privilege; as such, the
 6 withheld material need not be "predecisional."

7 Finally, Plaintiff raises no arguments disputing the Department's withholdings
 8 under the attorney-client privilege and attorney work-product privilege. As explained in
 9 the Department's *Vaughn* index, various documents, or portions thereof, were withheld
 10 under the attorney-client privilege and/or attorney work-product privilege in addition to the
 11 deliberative process privilege. Doc. 23-3.

12 **2. Defendant Properly Withheld Records Under Exemption 7(A).**

13 FOIA Exemption 7(A) authorizes the withholding of "records or information
 14 compiled for law enforcement purposes, but only to the extent that production of such law
 15 enforcement records or information . . . could reasonably be expected to interfere with
 16 enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

17 First, Plaintiff again contends that the Department's "investigation is no longer
 18 open." Doc. 26 at 9. Plaintiff is incorrect. The Department's investigation into GCU
 19 remains open as GCU's fine is on appeal (Doc. 23 at ¶¶ 11-13). *See Kansi v. U.S. Dep't of*
 20 *Just.*, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (finding plaintiff's pending motion for new a
 21 trial "a pending law enforcement proceeding for purposes of FOIA").

22 Citing a Ninth Circuit case involving the Court's review of a § 1983 claim, Plaintiff
 23 alleges that the release of the Department's investigatory materials would not harm the
 24 Department's position in the hearing requested by GCU before the Office of Hearings and
 25 Appeals because "new evidence is not permitted on appeal" (Doc. 26 at 9) (citing *Tucker*
 26 *v. Seattle Hous. Auth.*, 670 F. App'x 488, 489 (9th Cir. 2016)).

27 But courts examining the application of Exemption 7(A) have agreed that
 28 "[b]ecause the potential for interference remains even when a case is on appeal, [an agency]

1 is permitted to withhold law enforcement records until all reasonably foreseeable
2 proceedings stemming from that investigation are closed.” *Stein v. S.E.C.*, 358 F. Supp.
3 3d 30, 34-35 (D.D.C. 2019); *see also Pawlowski v. United States*, No. CV 19-3740 (TJK),
4 2023 WL 8272203, at *3 (D.D.C. Nov. 14, 2023) (finding potential for harm where
5 plaintiff did not dispute that he sought the documents to impact an appellate proceeding);
6 *Basey v. Dep’t of the Army*, No. 4:16-CV-00038-TMB, 2018 WL 8798586, at *9 (D.
7 Alaska May 14, 2018) (“Although Plaintiff’s trial has concluded and Plaintiff is currently
8 awaiting sentencing, the Court finds that Exemption 7(A) remains applicable at least
9 pending the conclusion of sentencing and the statutory period for a notice of appeal.”).

10 And as noted in the Department’s Motion for Summary Judgment, Plaintiff seems
11 to seek these documents to impact the administrative proceeding, as Plaintiff alleged in
12 multiple press releases that the Department “coordinate[d] [with] various federal agencies”
13 to “intentionally target[] [GCU] . . . based on extraordinarily thin allegations” (Doc 22 at
14 16; Doc. 23 at ¶ 15). But courts have held that Exemption 7(A) applies even if the
15 requestor’s purpose is to exonerate it. *See Pawlowski*, 2023 WL 8272203, at *3 (finding
16 Exemption 7(A) applicable where the plaintiff sought documents to “‘exonerate’ himself
17 through his appeal”). Even if Plaintiff does not seek the documents through FOIA to
18 exonerate GCU on appeal, release of the information to Plaintiff is considered a release to
19 all, and there is no mechanism available to contain the harm. *See Nat’l Archives & Records*
20 *Admin. v. Favish*, 541 U.S. 157, 174 (2004) (“It must be remembered that once there is
21 disclosure, the information belongs to the general public.”). Defendant therefore properly
22 invoked Exemption 7(A).

23 Second, Plaintiff contends the Department applied Exemption 7(A) to “several
24 records without any justification,” citing only FOIA Doc. No. 30. Doc. 26 at 10. However,
25 the Department described the basis for withholding FOIA Doc. No. 30 and similar
26 documents in paragraph 31 of the Declaration of Christopher Madaio. Doc. 23-1 at ¶ 31.

27 Third, Plaintiff argues that the Department applied Exemption 7(A) to
28 communications with the FTC, and that the “Department cannot claim Exemption 7(A) on

1 behalf of another agency . . . on the basis that disclosure of the records might interfere with
 2 that agency’s separate investigation.” Doc. 26 at 10. As described in *Vaughn* index, the
 3 Department withheld emails between Christopher Madaio and an FTC attorney regarding
 4 FSA’s GCU investigation because it contains strategic discussions related to *both*
 5 investigations. Doc. 23-3, FOIA Docs. Nos. 12, 35, 62.

6 And as explained in the Declaration of Christopher Madaio, the Department also
 7 withheld a document under Exemption 7(A) because the release of such document could
 8 “interfere with the Investigation Group’s ability to fully and fairly consider potential
 9 liabilities that, if imposed, could result in money being repaid to the Department” in a
 10 separate, unrelated investigation, not because of any interference with the GCU
 11 investigation. Doc. 23-1 at ¶ 31; Doc. 23-3, FOIA Doc. No. 30.

12 The Department is removing the Exemption 7(A) redactions from the March 5,
 13 2023, email of Christopher Madaio contained in FOIA Doc. No. 13,² because that email
 14 relates to enforcement work against an institution unrelated to GCU, and such enforcement
 15 work is neither ongoing nor related to the GCU investigation. *See* Exhibit 1, Revised
 16 *Vaughn* index (revisions in redline), FOIA Doc. No. 13.

17 **V. CONCLUSION**

18 For the foregoing reasons, Defendant respectfully requests that Plaintiff’s Motion
 19 for Summary Judgment be denied, that Defendant’s Cross-Motion for Summary Judgment
 20 be granted, and that judgment be entered in Defendant’s favor.

21 RESPECTFULLY SUBMITTED October 18, 2024.

22 GARY M. RESTAINO
 23 United States Attorney
 24 District of Arizona

25 /s/ Victoria H. Gray
 26 VICTORIA H. GRAY

27 ² The March 5, 2023, email of Madaio in FOIA Doc. No. 13 is on the page Bates stamped
 28 “REVISED ED 24-00550-F (Apr. 15, 2024)_000042.”

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